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No. 76-1251

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

FORD MOTOR COMPANY
and
J. WALTER THOMPSON COMPANY, *Petitioners*,
v.
FEDERAL TRADE COMMISSION, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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March 9, 1977

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Ford Motor Company ("Ford") and its advertising agency, J. Walter Thompson Company ("JWT"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, as amended by the order entered on December 10, 1976.

STATEMENT

On February 6, 1973, the Commission issued "proposed" complaints against petitioners Ford and JWT, its advertising agency, challenging claims in two television commercials relating to the structural strength and quietness of Ford automobiles. In informal meetings with FTC staff members to discuss settlement,[4] Ford and JWT expressed willingness to enter into consent orders limited generally to the kinds of advertising claims challenged in the proposed complaints.[5] The

[4] Subpart C of the Commission's Rules of Procedure, relating to the consent order procedure in effect during these proceedings, is set out in Appendix F. The procedure was summarized by the Court of Appeals for the District of Columbia Circuit as follows:

> "If the proposed respondent elects . . . to attempt a settlement, negotiations begin between the Commission's staff and the proposed respondent. If the parties are unable to agree, the Commission may commence formal adjudicative procedure . . . . If, however, an agreement is reached and accepted by the Commission, the provisionally accepted consent order is placed on the public record for a period of 30 [subsequently 60] days, during which time any interested party may file comments or views with the Commission. After reviewing any such public comments, the Commission may withdraw its acceptance of the proposed order or conclude the proceeding by final acceptance of the consent order . . . .

Action on Safety & Health v. FTC, 498 F.2d 757, 759 (D.C. Cir. 1974).

On April 4, 1975, after the administrative proceedings in this case were concluded, the Commission amended its Rules to eliminate the initial "proposed" complaint stage. 40 Fed. Reg. 15235-36 (1975). Such amendment does not affect the issues presented here or their continuing importance in FTC proceedings. The consent order procedure remains the same.

[5] Petitioners have at all times denied that the challenged advertisements were unlawful, and the settlement agreements recited that petitioners did not admit the allegations of the complaints.

staff insisted, however, that, as a matter of policy, the Commission would not accept orders limited narrowly to the claims challenged in the complaints, but would require the consent orders to be drafted broadly to cover all "performance" claims. Petitioners understood that this policy would also be applied to competitors against whom deceptive advertising charges were pending.

Accordingly, believing that they would not thereby be competitively disadvantaged, Ford and JWT submitted offers of settlement, in the form of consent order agreements also signed by the Commission staff.[6] The proposed consent orders included broad prohibitions dealing with "performance", as well as structural strength and quietness, claims. On June 17, 1974, the Commission notified Ford and JWT that it had "provisionally accepted" [7] these agreements and was placing them on the public record for comment for sixty days. (Pet. App. 24a-26a)

A few weeks later, before final acceptance by the Commission, petitioners learned that the Commission

[6] The staff members signing such an "agreement" thereby express approval of the offer of settlement submitted for the Commission's consideration. The Commission has never argued that at this stage a consent order agreement is a binding contract, and has conceded that "until the Commission accepts, this is a mere offer which . . . may be withdrawn during this period. . . ." Brief for Respondent, Johnson Products Co. v. FTC, p. 14, No. 76-1424 (7th Cir. Feb. 16, 1977) (Appendix E).

[7] The term "provisionally accepted", while not appearing in the Commission's Rules, has been regularly used by the Commission in its orders and press releases to describe such preliminary approvals, differentiating them from "final" acceptance of consent order agreements and issuance of final orders. See footnote 4, *supra*.

dentiary hearing on this issue. Judge McCree, dissenting, would have affirmed. (Pet. App. 15a-18a.)

Thereafter, Commission counsel filed a petition for rehearing, citing for the first time the *GM-Cadillac* order (*see* p. 6, *supra*) which, they argued, fully answered petitioners' claims of competitive disadvantage.[9] In response, petitioners pointed to the differences between their orders and those in the *GM* cases, and argued that the *GM-Cadillac* order in fact reinforced, rather than rebutted, Ford's claim of competitive disadvantage (*see* pp. 16-17, *infra*). They also pointed out that the *GM-Cadillac* order did not run against GM's advertising agency, and thus could not possibly affect JWT's claim.

On December 10, 1976, without discussing petitioners' arguments and stating only that the *GM-Cadillac* order "completely negates" Ford's claim of competitive disadvantage and "also serves to cast doubt" on JWT's claim, the Court of Appeals granted the petition for rehearing, amended its original opinion, and entered judgment affirming the Commission's orders. (Pet. App. 20a)

REASONS FOR GRANTING THE WRIT

The Court of Appeals in this case upheld the unprecedented and extraordinary action of the Federal Trade Commission in issuing "consent" orders against unconsenting and protesting parties. This Court has recognized the obvious anomaly of a consent decree where there is "lack of actual consent to the decree as

[9] Neither in the administrative proceedings nor in the Court of Appeals had the Commission or its appellate counsel cited or referred to the *GM-Cadillac* order.

entered." *Swift & Co.* v. *United States,* 276 U.S. 311, 324 (1928); and see *NLRB* v. *Ochoa Fertilizer Corp.,* 368 U.S. 318, 323 (1961).

The overwhelming majority of FTC proceedings are settled by the entry of consent orders. If allowed to stand unreviewed, the decision below will cast a cloud upon the integrity and fairness of the settlement procedures of the Federal Trade Commission and other federal regulatory agencies.

The error of the Court of Appeals is compounded by its unexplained, and inexplicable, disregard of the basic principle of judicial review of administrative orders established by this Court in *Chenery* and *Burlington Truck Lines:* that "the grounds upon which the administrative agency acted [must] be clearly disclosed and adequately sustained;"[10] and that its actions must be judged on the basis of the reasons stated by the agency, and not on "appellate counsel's *post hoc* rationalizations."[11]

The Court of Appeals found that the Commission "simply refused to comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage." (Pet. App. 10a, 33a) Yet, the court affirmed the Commission's orders on a ground never mentioned or relied on by the Commission or its staff throughout the entire administrative proceedings, and which first appeared in the petition for rehearing filed by FTC appellate counsel, *viz.,* that the *GM-Cadillac* order fully answers petitioners' claims of competitive disadvantage.

[10] SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

[11] Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962).

Moreover, the Court of Appeals thereby undertook to decide *de novo* an issue which this Court's decisions reserve for original consideration by the Federal Trade Commission. As the Court has repeatedly held, only the Commission and not a reviewing court has the "special competence" necessary to appraise the competitive effects of the agency's orders. *Moog Industries, Inc.* v. *FTC,* 355 U.S. 411, 413 (1958); *FTC* v. *Universal-Rundle Corp.,* 387 U.S. 244, 251 (1967).

The *Chenery/Burlington Truck Lines* and *Moog/Universal-Rundle* rules embody important and necessary values and safeguards in the administrative process. Where so clear a violation of these rules occurs as in this case, review by this Court is plainly warranted.

Both in this case and in the *Johnson* case which arose shortly thereafter and was decided by the Seventh Circuit on February 16, 1977,[12] the Commission denied, without explanation, withdrawal requests made in good faith [13] and based on substantial claims of unfair competitive disadvantage which the agency was under a duty to consider. *Moog Industries, Inc.* v. *FTC, supra; FTC* v. *Universal-Rundle Corp., supra.* In the *Johnson* case, three days before the oral argument of the appeal in the Seventh Circuit, the Commission invited Johnson to apply for a modification of its consent order to remove alleged discrimination favoring its major competitor, Revlon. Accordingly, the Court of Appeals for the Seventh Circuit, being "of the opinion

[12] Johnson Products Company v. FTC, No. 76-1424 (Appendix E).

[13] There has been no finding or suggestion by the Commission that petitioners' requests for withdrawal were filed for purposes of delay or reflected a change of mind.

that, before deciding what may prove to be an important and difficult question of administrative law, the Commission should first be afforded the opportunity to reexamine the challenged disparities between the *Johnson* and *Revlon* orders," remanded the case to the Commission for that purpose. (Pet. App. 52a)

A direct conflict thus exists between the decision of the Sixth Circuit in this case and that of the Seventh Circuit in the *Johnson* case. Here, too, the case should have been remanded to the Commission for consideration of petitioners' claims of unfair competitive disadvantage—an issue within the "special competence" of the Commission. *Moog Industries, Inc.* v. *FTC, supra; FTC* v. *Universal-Rundle Corp., supra.* It was a clear abuse of discretion for the Commission, as the court below found, to refuse to "comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage." (Pet. App. 33a) Discretion is conferred upon an agency so that it may be exercised. Refusal to exercise discretion is no less an abuse than an arbitrary exercise.

I

In *United States* v. *Ward Baking Co.,* 376 U.S. 327 (1964), the district court entered an antitrust "consent" decree over the objections of the Department of Justice Reversing in a unanimous decision, this Court held it error to enter such a decree "without the actual consent of the Government" because no party should be "foreclosed from a right to go to trial . . . ." 376 U.S. at 334-35. The Government's brief (pp. 32-33) emphasized the voluntary nature of a defendant's waiver of his right to go to trial:

> [F]rom the defendant's side, the acceptability of a settlement involves evaluating various restric-

> tions in the light of the uncertainties and costs of litigation, business exigencies, and other circumstances. There is no compulsion upon a defendant to accept a consent decree proposed. . . . If an antitrust defendant regards the government's settlement terms as unreasonable, his remedy, like that of any other litigant who cannot agree upon settlement with his adversary, is to reject the proposal and go to trial.

In short, both parties must consent if a proposed settlement is to be valid. If before settlement is reached, a party chooses to litigate and withdraw his offer to settle, the requisite consensual basis of the agreement disappears.

This basic principle rests on a constitutional foundation. In *United States* v. *Armour & Co.*, 402 U.S. 673, 682 (1971), the Court stated that in agreeing to a consent decree, a party "waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause . . . ." Accordingly, "the conditions upon which he has given that waiver must be respected . . . ." 402 U.S. at 682.

The question, then, is simply whether at the time of withdrawal by petitioners a binding settlement had been reached. It had not. It is a general rule of law that until acceptance an offeror is free to withdraw his offer. If the Commission intended that settlement offers in its proceedings should be subject to a different rule limiting the normal right to withdraw an offer prior to acceptance, it was under a duty to give clear and unambiguous public notice to that effect. The Commission's Rules gave no such notice. When petitioners submitted their settlement offers, there was no published Commission interpretation of its Rules and

no reported case refusing to recognize the right of withdrawal before final acceptance.[14]

The decision below appears to be based on the erroneous premise that the right of an offeror to withdraw an unaccepted offer must be expressly granted or confirmed by some agency rule. The contrary is true. That right inheres in the nature of a legal offer. An explicit rule is required not to create a right of withdrawal before acceptance, but to justify any denial or limitation of it.

To support its refusal to permit Ford/JWT's withdrawal of consent to the proposed orders, the Commission relies solely on Section 2.34 of its Rules. (Appendix F.) That provision, however, merely informs the public of the various alternative actions the *Commission* may take after expiration of the 60-day public comment period. It neither addresses the question of a respondent's right to withdraw an offer before acceptance nor purports to impose any time limitations on the exercise of that right.

As the Court has stated, "consent makes a significant difference; it relieves [an agency] of the very necessity of making a supporting record." *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 323 (1961). A respondent thereby waives his "right to litigate the issues raised." *United States* v. *Armour & Co., supra.* A waiver of constitutional rights is binding only if clear notice is given of its consequences. As applied to petitioners, Section 2.34 failed to give such notice.

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[14] In preparation of their appeal brief, petitioners filed a Freedom of Information Act request for all precedents. In the only case disclosed in its response, the Commission *invited* withdrawal of consent after provisional acceptance, where respondent contended that intervening events made the proposed consent order unacceptable. Sunshine Art Studios, Inc., FTC File No. 682 3221 (closed Nov. 9, 1971). (Pet. App. 33a.)

The Commission's position is also contrary to the Administrative Procedure Act, which specifically prohibits an agency from relying on or using an interpretation of a rule against a party unless it has given actual and timely notice of such interpretation. 5 U.S.C. § 522(a)(2)(C)(ii).[15] As the Commission conceded in its brief to the Seventh Circuit in the *Johnson* case, "when Ford entered into its consent agreement [in December 1973] the Commission had not yet had occasion to construe its Rules concerning the claimed right of a respondent to withdraw unilaterally."[16] Petitioners had no reason to anticipate that the Commission would come forth ten months later with a novel interpretation of its Rules drastically modifying the general rule that an offer is not binding until final acceptance.

In short, the Commission denied petitioners' withdrawal requests on the basis of an unpublished, retroactive interpretation of a Rule that was, at least, ambiguous. No question is presented in this case, therefore, whether the Commission lacks power to promulgate a rule putting the public on notice that an offer of settlement may not be withdrawn for a specified period of time while under Commission consideration. Had such a rule been in effect when Ford and JWT

[15] The relevant portion of the statute provides:

"A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—. . . (ii) the party has actual and timely notice of the terms thereof."

[16] Brief for Respondent, p. 14.

submitted their settlement offers, the issue here would be different.[17]

II

In support of their withdrawal requests before the Commission, Ford and JWT pointed to the disparate treatment given General Motors and its advertising agencies. The Commission at no time addressed the merits of their contention. The only reason given by the Commission for refusing to allow Ford and JWT's withdrawal of consent was that its Rules "do not authorize unilateral withdrawal by a respondent from an agreement [provisionally] accepted by the Commission". (Pet. App. 32a) As explanation for its rejection of Ford/JWT's requests that the Commission withdraw its provisional acceptance, the Commission stated only that "the public interest would not be served by such action." (Pet. App. 32a)

These curt, conclusory statements fall far short of what this Court's decisions require of an agency in explaining or justifying actions subject to judicial review. When an agency "exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" *NLRB* v. *Metropolitan Ins. Co.,* 380 U.S. 438, 443 (1963); *SEC* v. *Chenery,* 318 U.S. 80, 94 (1943).

The Commission's explanation here that "the public interest would not be served" by the requested actions

[17] We know of no administrative agency which has taken a position similar to that of the Federal Trade Commission in this case. The only agency—the Civil Aeronautics Board—which has a regulation dealing with the question provides that in civil penalty and aircraft seizure hearings, "[a]n offer of compromise may be withdrawn by the respondent *at any time prior to its final acceptance* . . . ." 14 C.F.R., § 302.807 (emphasis added).

is no more enlightening than the Board's assertion in *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 182 (1941), that its order would "effectuate the policies" of the National Labor Relations Act. The Board's statement was held inadequate because it did not "disclose the basis of its order" or permit the Court to "really tell why the Board" acted as it did. 313 U.S. at 196-97.

Clearly, the Commission in this case was "obligated to provide petitioner[s] with an explanation for the differences in their treatment . . . ." *Marco Sales Co.* v. *FTC,* 453 F.2d 1, 7 (2d Cir. 1971). There, the Commission prohibited respondent from using games of chance while imposing no such prohibition on similarly situated sellers. The Second Circuit held the Commission's order to be "arbitrary" because of "its total failure to even advert to, much less explain, its reason" for the disparate treatment. 453 F.2d at 6. The same is true of its actions here.

III

Because of the Commission's complete silence, it is at best conjectural whether, in October 1974 when it rejected petitioners' claims, the Commission did in fact consider or rely upon the *GM-Cadillac* order. That order was never mentioned by the Commission throughout the entire administrative and judicial proceedings. It was not until August 1976, when FTC counsel filed a petition for rehearing in the court below, that it was first suggested that the *GM-Cadillac* order rebuts petitioners' claims of competitive disadvantage.

Indeed, Ford/JWT had brought the *GM-Cadillac* order to the attention of the Commission on August 8, 1974, in *support* of their claims. (*See* p. 8, *supra.*)

It is not enough to assume that the Commission must have been aware of its own order in that case when it issued the Ford/JWT orders two months later. If the Commission had it in mind as the *reason* for rejecting petitioners' claims, it is incredible that no mention was made of it until 22 months later, after the case had been lost in the Court of Appeals.[18] As Mr. Justice Cardozo said for the Court in a leading case, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 511 (1955).

In any event, it was plain error for the Court of Appeals to use an imaginative "after-afterthought" of FTC appellate counsel in a petition for rehearing as the basis for affirmance of the Commission's cryptic orders. The court simply ignored or overlooked the *Chenery* rule which "requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself . . . ." *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168-69 (1962).

It was no less improper for the Court of Appeals, without any prior Commission consideration or resolution of the issue, to undertake to decide *de novo* whether the *GM-Cadillac* order did in fact "negate" Ford/JWT's claims of competitive disadvantage.[19]

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[18] In its order of December 10, 1976, granting rehearing, the Court of Appeals stated that "however negligent such failure [to cite the *GM-Cadillac* order] was, the failure was not deliberate or contemptuous. • • • We note and accept the Commission's apologies for omission. . . ." (Pet. App. 21a, 23a.)

[19] In response to the petition for rehearing, Ford had demonstrated substantial differences between its order and that issued against General Motors. For instance, the Ford order extends to

Appraisal of the competitive effects of its orders was within the "special competence" of the Commission, not the court below. *Moog Industries, Inc.* v. *FTC, supra; FTC* v. *Universal-Rundle Corp., supra.*

The Court of Appeals also erred in stating that the *GM-Cadillac* order "serves to cast doubt" upon JWT's claim of competitive disadvantage. It made no mention of the fact, noted in petitioners' response to the petition for rehearing, that the *GM-Cadillac* order does not run against General Motors' advertising agency (*see* p. 6, *supra*). In the circumstances, the court's statement is mystifying.

CONCLUSION

The decision of the Court of Appeals raises novel and important questions affecting the settlement of agency proceeding by consent orders.

Issuance of consent orders against petitioners after they had withdrawn consent was a legal paradox without court or Commission precedent. Denial of their withdrawal requests without any statement of reasons was a clear violation of the Commission's duty to inform the parties and reviewing courts of the basis for its actions.

In failing to remand this case to the Commission for consideration of petitoners' claims of unfair competitive disadvantage, the Sixth Circuit's decision is in

all performance claims that the Commission may later decide lacked sufficient substantiation when made. By contrast, the *GM-Cadillac* order contains only a narrow prohibition of false or unsubstantiated advertising of tests and test results relating to car performance. In effect, the *GM-Cadillac* order regulates only what GM can say about its tests, not what it can say about its cars. The order would not be applicable if GM makes performance claims without reference to tests or test results. These differences were totally ignored by the Court of Appeals.

direct conflict with the recent ruling of the Seventh Circuit in the *Johnson* case.

By affirming the Commission's orders on a new ground not relied on or mentioned by the agency prior to the filing of a petition for rehearing by its appellate counsel, the court below departed from established principles governing judicial review of administrative action.

The petition for certiorari should be granted.[20]

Respectfully submitted,

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March 9, 1977

[20] In view of the plain violations of the *Chenery/Burlington Truck Lines* and *Moog/Universal-Rundle* rules, the Court may wish to consider summary reversal and remand to the Commission.

APPENDIX

APPENDIX A

Original Opinion

Nos. 75-1041, 75-1043

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FORD MOTOR COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

J. WALTER THOMPSON COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Consolidated Petitions to Review Orders of the Federal Trade Commission

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Decided and Filed June 21, 1976.

Before: EDWARDS, CELEBREZZE and MCCREE, Circuit Judges.

EDWARDS, Circuit Judge, delivered the opinion of the Court, in which CELEBREZZE, Circuit Judge, joined. MCCREE, Circuit Judge, (pp. 15-18) filed a dissenting opinion.

EDWARDS, Circuit Judge. These are consolidated petitions filed by the Ford Motor Company and J. Walter Thompson Co., its advertising agency, to review and set aside certain "consent" cease and desist orders entered by the Federal

Trade Commission against both concerns. The underlying actions were brought by complaints issued under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45 (b) (1970), involving alleged unfair advertising of Ford Division products. One ad concerned the assertion that Ford Division cars were quieter than a glider in flight (which FTC contends isn't quiet at all). The other ad showed the alleged structural strength of Ford cars to resist lateral impact by having a hoist pick one up by the side rails. (The ability of the side guard rails to sustain the weight of the car does not, in FTC's view, prove much about their resistance to lateral impact.)

Both companies and FTC negotiated a proposed consent order under the FTC Rules then applicable. 16 C.F.R. § 2.31-2.35 (1974).[1] The companies filed the consent orders properly executed by them, and the FTC provisionally accepted the proposed order. The rules also provided for the publication of the consent order for a period of sixty days in which FTC would accept comments, after which time the FTC would make a decision on whether or not finally to accept the consent order.

Ford and J. Walter Thompson assert that they were told during the negotiations by FTC representatives that FTC would not accept consent orders limited narrowly to the claims actually made in the pending complaints. Thereupon the order was drafted and consented to by the companies, applicable to all performance claims for the indefinite future. It is the breadth of the language employed in this regard which triggered this controversy.

Ford and J. Walter Thompson assert that during the sixty-day publication period, they learned that FTC had agreed with General Motors and its advertising agencies

[1] The rules have since been revised. *See* 40 Fed. Reg. 15235-36 (1975). The revision would not, however, necessarily avoid reoccurrence of the sort of dispute involved in this case.

to a consent order limiting certain practices complained of in relation to that corporation to the specific practices involved. Ford then wrote the FTC indicating that the reported terms of the General Motors agreement would place Ford at a competitive disadvantage, that the consent order was no longer acceptable to Ford, and asking FTC to recall its provisional acceptance. FTC did not respond substantively to these communications, and on August 13 and 14, 1974, J. Walter Thompson and Ford filed letters of withdrawal of their consent. Thereafter, on October 21, the Secretary of the FTC wrote Ford and J. Walter Thompson that FTC rules don't authorize unilateral withdrawal by a respondent and that FTC would not withdraw its provisional acceptance. On November 19, 1974, FTC issued a final order to this effect. Both Ford and Thompson filed motions for reconsideration with FTC which motions were denied, resulting in this litigation.

We believe that this court has jurisdiction to hear a dispute between these parties concerning the validity of a "consent" agreement which dispute concededly arose by dint of an attempt to withdraw consent before the agreement became final. *See Swift & Co.* v. *United States,* 276 U.S. 311, 324 (1928); *Martin Marietta Corp.* v. *Federal Trade Commission*, 376 F.2d 430, 434 (7th Cir.), *cert. denied,* 389 U.S. 923 (1967).

Two other of the issues presented by the parties in this case may be disposed of quickly.

First, petitioners Ford and Thompson argue that respondent Federal Trade Commission was required, but failed, to support its consent orders entered in this case by findings of fact and conclusions of law. As we understand both the general nature of a consent order and the specific terms of the FTC rule applicable at the relevant times in this case, 16 C.F.R. § 2.31-2.35 (1974), the principal purpose of a consent order is to avoid the fact find-

ing and adjudicatory process which petitioners now seek. Assuming that the consent orders herein were otherwise final and valid, we find no merit to this argument.

Second, respondent FTC claims that petitioners' current case should be dismissed because in the proposed consent orders they waived their rights to judicial review. The short answer to this argument is that generally the tail goes with the hide. Petitioners claim that their consent orders were legally withdrawn before they became final and binding. They also claim, in the alternative, that it was an abuse of discretion on the part of the Commission to fail to allow them to withdraw their consent. In either instance, the waivers of judicial review would be withdrawn with the consent orders.

We would phrase and answer the principal issues in this case as follows:

1) Was the Commission's interpretation of its consent order rules consistent with their language and with due process to the extent that they prevented petitioners' attempted unilateral withdrawal of consent?

We answer this question affirmatively.

2) Assuming the affirmative answer above, the remaining issue is: Even if petitioners were not themselves privileged to withdraw their proffered consent orders, did the Commission abuse its discretion by refusing to withdraw its own provisional consent when petitioners sought such action on the grounds that subsequent developments concerning a major competitor showed that petitioners were being placed at an unfair competitive disadvantage by the consent orders?

Since no evidence was taken on petitioners' claims of competitive disadvantage, we set aside the Commission's refusal to withdraw its own consent as an abuse of discretion and remand this issue for evidentiary hearing.

THE CONSENT ORDER RULE

Petitioners contend that:

> [T]he Commission's Rules placed no limitation on a respondent's right to withdraw consent before final action by the Commission and the Commission had never previously announced any interpretation of its Rules to preclude such withdrawal.

Respondent FTC in turn contends that the Commission's interpretation of its own rules is entitled to great deference and it interprets Rule 2.31-2.35 as not permitting unilateral withdrawal by petitioners. In this regard it analogizes the tender of the consent order to a stipulation of fact tendered to a court of law. It also emphasizes that Rule 2.34(b) by its terms allows the Commission to withdraw its "provisional consent," but does not provide any such right to petitioners. It therefore argues that the Latin maxim *expressio unius est exclusio alterius* (The mention of one implies the exclusion of others) applies to this case.

We consider the stipulation analogy and the cases illustrating it to be inapposite. The admission of facts and the consent to an order are neither identical nor even closely comparable. But certain provisions of the rules themselves are persuasive that Ford was intended to be bound.[2] These provisions call for 1) provisional acept-

[2] (b) Upon receiving such an agreement, the Commission may: (1) accept it; (2) reject it and issue its complaint and set the matter down for adjudication in regular course; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will

ance by the Commission, 2) publication of the consent agreement with an invitation for public comment thereon for a period of sixty days, and 3) a one month period after receipt of public comment for the Commission to withdraw consent or to make its provisional acceptance final. As we see these separate provisions, they provide a final review of the proposed order after public scrutiny, with the Commission having the final right in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered. The Commission thus has reason to withhold its final approval and it likewise has reason not to extend that same right to withdraw to the party proposing the consent. The time limitations are reasonable ones. The party proposing the consent order is not left unilaterally committed for an indefinite period.

We conclude that the Commission's interpretations of its rules as prohibiting Ford and Thompson from unilateral withdrawal of their proposed consent orders is consistent with the language of the rule, does not offend due process, and should be accepted by this court. In this regard we recognize the deference due the Commission's interpretation of its own rules as frequently declared by the United States Supreme Court. *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The Competitive Disadvantage Issue

As to petitioners' claim of abuse of discretion, the position of the parties is fully stated by the following excerpts

receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require), and decision in disposition of the proceeding. 16 C.F.R. 2.34(b) (1974).

from the first of several Ford letters concerning this issue and from the single responsive letter from the Commission:

Ford's (and presumably Thompson's) Position

The Commission's Inconsistent Treatment of Ford and General Motors

While the Commission was investigating and negotiating with Ford concerning its "Lift" and "Glider" commercial, it was also investigating and subsequently litigating with General Motors the legality of Vega and Opel commercials in Docket No. 8907. Although the charges against General Motors were, in our view, more serious than those against Ford,[2] Ford believed that because of the strenuous competition between these two leading manufacturers, the Commission would consider the two matters in parity and apply equivalent and nondiscriminatory regulatory standards to both. This, historically, has been the Commission's pattern. Thus, in entering into consent negotiations in an effort to avoid prolonged and wasteful litigation, Ford justifiably expected that the ultimate disposition of the *General Motors* case would not place Ford in an unfair competitive disadvantage.

In entering into consent negotiations, Ford was advised by the Commission staff that, while the advertising challenged dealt only with claims of "quietness" and "structural strength," any Order to be acceptable to the Commission must, as a matter of policy, cover

[2] The Commission in the Ford Complaint charged that certain advertising demonstrations did not prove the qualities of "strength" and "quietness" allegedly represented in the advertisements, but the Commission at no time challenged the truthfulness of the basic product claims themselves; the Commission in the General Motors Complaint, in contrast, challenged as untruthful the basic product claims made in the ads.

"performance" claims as well. Recognizing that cease and desist orders have traditionally been broader in scope than the particular practice challenged, Ford was willing to consider such an Order. At no time did it occur to Ford, or indeed appear plausible, that the Commission would consider applying a different standard in the *General Motors* case, in contravention of such policy.

It has now come to Ford's attention, through trade reports, that General Motors may have entered into a consent agreement with the staff in settlement of its case which contains an order limited to the claims challenged in its complaint (comparative "handling" claims) and fails to include the broad coverage of "performance" claims contained in the provisional Ford Order. This would be a far less stringent standard than applied in the *Ford* case and, if allowed to stand, would place Ford at such a competitive disadvantage as to make the Ford Order unacceptable.

We do not know with certainty that such an agreement has been reached in the *General Motors* case. None is contained in the public record, but the Commission's public record does show an order of the Administrative Law Judge, dated May 3, 1974, containing a recitation that, on May 2, 1974, "it was indicated that a proposed consent settlement had been reached between complaint counsel and respondent General Motors . . . ." Reports in the industry appear to confirm that an agreement has been reached.

So fundamental a difference in the compliance obligations which Ford and General Motors would carry under these Orders—particularly since the greater burden on Ford bears no relationship to the severity of the charges involved—would constitute an intolerable intrusion by the Commission into competition between the two companies. While this difference

may result from the fact that the agreements were apparently negotiated by separate components of the Bureau of Consumer Protection, it cannot be justified on that basis. The Commission's obligation to protect the public interest carries with it a concomitant responsibility to regulate similarly situated competitors in the same industry in a fair, equal and even-handed manner.

Ford has already suffered damaging publicity as a result of the unfortunate circumstances described above. To avoid further damage and to remain competitive, we must now ask that the Commission take action to assure that equivalent "fencing-in" of the two companies will result from entering these Orders. We, therefore, request, in light of the substantially narrower Order reportedly agreed upon in General Motors, that the Commission now recall the provisional Ford Order and similarly reduce its coverage to the claims actually challenged in the Ford Complaint, i.e., structural strength and quietness, eliminating the reference to broad general "performance" claims which now seems wholly inappropriate.

We urgently request the Commission's prompt consideration of this matter. Since the 60-day period during which the provisional Ford Order remains on the public record will expire on August 15, we ask for a reply sufficiently in advance of that date so Ford may determine what further action, if any, may be necessary in order to protect the Company's interests.

The Commission's Reply

This is in response to your letters of July 12, August 8, and August 14, 1974, which the Secretary acknowledged by letter of August 19, 1974.

With respect to the purported withdrawal by Ford Motor Company from the Agreement Containing Con-

> sent Order to Cease and Desist, dated December 14, 1973, in File No. 722 3122, you are advised that the Commission's Rules of Practice do not authorize unilateral withdrawal by a respondent from an agreement accepted by the Commission pursuant to Subpart C thereof (Sections 2.31 through 2.35, inclusive). The Commission has, however, reviewed the facts and considerations set forth in your letters as argument in support of a request that the Commission withdraw its acceptance of the Agreement. The Commission finds that the public interest would not be served by such action.

The Commission's brief filed in this appeal adds little to the modicum of information provided above. It complains about the lack of specificity in the petitioners' allegations concerning the General Motors consent order (which petitioners, as of the July 12, 1974, date, could not have seen). It also argues:

> Besides, while the GM consent order is less restrictive than the Ford consent order in one respect, the GM order is substantially *broader* in coverage. The advertising ban in the Ford order applies only to *some* vehicles, while the GM order applies to *all vehicles*. (J.A. 17, Pet. Br. A-15). Understandably, Ford does not complain about *this* aspect of its consent order.

Basically, however, the Commission simply refused to comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage arising after petitioners had filed their consent orders because of the assertedly more favorable treatment of Ford's prime competitor, General Motors.

While we have previously upheld the Commission's contention that petitioners had no absolute right to withdraw their consent orders, petitioners also timely sought the Commission's own withdrawal of its "provisional" consent. *See generally Sunshine Art Studios, Inc.*, FTC File No. 682 3221. This action was clearly within the Commission's powers as defined by its own rules. The Commission's refusal to withdraw its consent is reviewable by this court for abuse of its discretion under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

The General Motors order referred to by petitioners is now, of course, a matter of public record. The differences in treatment are real ones:

The Ford Order

> It Is Ordered that respondent, Ford Motor Company, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of the Ford LTD automobile, the Ford Galaxie automobile or any other motor vehicle marketed by the Ford Division, do forthwith cease and desist from:
>
> (a) Unfairly or deceptively advertising any such product by presenting evidence, including tests, experiments, or demonstrations, or the results thereof, that appears or purports to be evidence of the structural strength, quietness or performance of such product, that is material to inducing the sale of such product, but which is not competent or reliable evidence to prove such fact or product feature.
>
> (b) Making any statements or representations directly or by implication, concerning the structural strength, quietness or performance of the said products or any part thereof, unless there

exists a reasonable basis for such statements or representations; provided that such a reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

The General Motors Order

I. It Is Ordered that respondent General Motors Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

   (a) respondent has a reasonable basis for such representation, which shall consist of a competent scientific test or tests that substantiate such representation; and

   (b) respondent's agents, employees or representatives who are responsible for engineering approval of any advertisement containing such representation rely on such test or tests in approving such advertisement and provide to respondent's agents, employees or representatives who are responsible for approval of such advertisement a written statement that such test or tests exist which substantiate the representation.

Thus Ford, under the disputed consent order, would be subject to a direct Commission order to cease and desist from not just the structural strength and quietness claims (which triggered this complaint), but from *all performance claims* which may be deemed based on false or deceptive advertising.

General Motors, on the other hand, is under no such broad continuing restrictions. Its order is limited to the subject of the complaint against it, namely, superiority in handling. The term "performance" seems broad enough to put any and all Ford advertising which deals with the characteristics of its automobile on the road, and which some Commission agent considers deceptive under the threat of contempt proceedings rather than the normal complaint and hearing process.[3] This would apply directly to the currently important area of gasoline economy. In this and other areas of automobile advertising it might well be that advertising executives would let their imaginations range more inventively without the threat of a contempt order than with it. Our point, of course, is not that the Commission should falter in its duty to restrain deceptive advertising. It should, however, maintain both an even-handed approach to fierce competitors in a single in-

[3] We note that the Commission makes the point that its "handling" order against General Motors is applicable to all automobiles which General Motors makes, whereas its Ford order is only applicable to the Ford Division. The record does not, however, show what percentage of Ford Motor Company cars are manufactured by the Ford Division. Perhaps more important, as to this point, the Commission's order against the Ford agency J. Walter Thompson is applicable to all automobile advertisements it prepares.

dustry and the appearance of doing so. The United States Supreme Court has noted, "the Federal Trade Commission does not have unbridled power to institute proceedings which will arbitrarily destroy one of many law violators in an industry." *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967).

We take judicial notice that General Motors is the dominant automobile manufacturer in this country and commands over a majority of the market. We also take judicial notice that competition between automobile manufacturers is extremely keen and that Ford is General Motor's nearest competitor—but at a considerable distance.

The Federal Trade Commission is directly charged by federal law with duties pertaining to restraint of monopoly and maintenance of fair competition. *See* 15 U.S.C. § 21(a) (1970); 15 U.S.C. § 45(a), (b) (1970); 15 U.S.C. § 13(a) (1970). The last cited statute, for example, prohibits price discrimination which tends "substantially to lessen competition or . . . to create a monopoly." Federal Trade Commission enforcement is authorized. The Commission, of course, would not want to encourage with its left hand conditions which its right hand is engaged in restraining.

Against this background, we conclude that the Commission failed to develop a record upon which this court can make an appropriate judgment of Ford's and Thompson's claims. It may be that the addition to the Ford "consent" order of the broad "performance" restriction would not place Ford at any substantial competitive disadvantage vis-a-vis its major competitor. All we now hold is that the Commission should not brush aside such a claim without affording a hearing and making findings on the subject. Failure of the Commission to respond to this degree to Ford's and Thompson's petition for withdrawal of the provisional consent before the disputed order became final

was, we believe, under the total circumstances of this case, an abuse of discretion.

We do not by any means intend the holding described above to be read as a general escape hatch for those who propose FTC consent orders or as an easy route to a hearing upon every request to withdraw due to a change of a respondent's mind.

We regard our holding as to the second issue in this case as creating a very narrow exception to the general rule of finality of FTC consent orders described in § 1 of this opinion. To take advantage of such an exception, the respondent who has proposed a consent order, must allege 1) a major change of circumstance *after* submission of the consent order and *before* the Commission's final acceptance of the consent order. 2) The change of circumstance must be one which respondent could not reasonably have anticipated and over which respondent had no control. 3) The change of circumstance alleged must be such as to state a prima facie case of unfair and serious economic disadvantage capable of threatening the competitive position of the respondent in the industry concerned.

The case is remanded to the Federal Trade Commission for further proceedings consistent with this opinion.

McCree, Circuit Judge (Dissenting). I respectfully dissent.

I agree with the majority that an order unconditionally consented to by the FTC and a respondent named in an FTC complaint is enforceable unless the FTC withdraws its consent during the period when public comment is invited on the question whether the order will be in the public interest. *Compare Sunshine Art Studio, Inc.*, FTC File No. 682 3221 (consent expressly conditioned upon the order becoming effective on a specified date).

Neither Ford nor J. Walter Thompson expressly conditioned its consent upon a representation by the FTC that

it would not enter into a more favorable agreement with any competitor of Ford. An expression of unqualified consent to a written agreement does not become conditional merely because, as petitioners assert, the FTC staff persons with whom they were negotiating stated that it was agency policy to require all consent agreements to cover "performance" claims without limitation, instead of only the specific claims challenged in an FTC complaint. Before signing the agreement, petitioners could have insisted upon the inclusion of a "most favored nation" clause. *See Winn-Dixie Stores, Inc.* v. *FTC,* 377 F. Supp. 773 (M.D. Fla. 1974).

However, after holding that petitioners could not withdraw their consent, the majority opinion regards petitioners' allegation that a competitor was permitted to consent to a more favorable order as imposing an obligation on the FTC to hold a hearing and to make findings of fact whether the proposed order consented to by Ford and J. Walter Thompson was in the public interest. The opinion states that a hearing is required only when a respondent to a proposed consent order alleges (1) that there was a major change of circumstances after the submission of the consent order, which (2) the respondent could not have anticipated, and (3) that the change of circumstances states a "prima facie case of unfair and serious economic disadvantage capable of threatening the competitive position of the respondent in the industry concerned."

The majority's holding, by providing an opportunity to reopen a consent order under the guise of protecting the "public interest," subverts the general rule that a respondent who unconditionally consents to an order is bound, and it indirectly nullifies petitioners' express waiver of judicial review of the order. The majority opinion seeks to limit the impact of the exception it creates by listing the three prerequisites noted above. The majority

opinion fails to recognize that there are two different categories of objections to consent orders: those that are of concern primarily to a respondent who earlier consented to the order, and objections to the order as being contrary to the *public* interest. I believe that the prerequisites for relief, as well as the nature of the relief, should vary according to the source and nature of the objection. In the case of objections to the entry of a consent order based upon the interests of a respondent, it might be appropriate to recognize a limited exception to permit relief when it would be *unconscionable* to hold a respondent to an order to which he consented. In such a case, if there were contested issues of fact, it might be proper to require a hearing on the question whether it would be unconscionable to hold the respondent to his consent. If, on the other hand, either a respondent, or a disinterested person, *pro bono publico,* should assert during the period for public comment that the order would be contrary to the *public* interest, judicial review should be limited to determining whether the FTC properly considered the objection, with or without a hearing, and whether it rejected the objection arbitrarily.

The first two conditions identified by the majority opinion as prerequisites for relief concern the impact of the order on the respondent alone, and the third concerns the public interest in free competition. In my view, we should not consider the first two objections in determining whether the FTC arbtirarily rejected an objection to the order as contrary to the public interest.

I do not find any abuse of discretion in the manner of the FTC's handling of the third objection. I do not believe that a hearing and formal findings are necessary in every instance where the FTC receives objections during the public comment period, because such a sweeping rule would unnecessarily encumber a consent procedure that was designed to avoid t'.e delays and costs of formal con-

tested proceedings. Further, I perceive no reason why a hearing is especially mandated in these circumstances.

In this proceeding, the objection received by the FTC during the period for *public* comment came not from a disinterested person, *pro bono publico,* but instead from the respondents who had already consented to the order. Moreover, the petitioners' objection was that a respondent in a similar proceeding might have negotiated a more advantageous settlement.

The majority holds, without satisfactorily explaining its conclusion, that the FTC abused its discretion in refusing to withdraw its consent to the orders without a hearing and formal findings. I would hold that our review should be limited to determining whether the FTC's actions were arbitrary. The FTC did not arbitrarily ignore petitioners' representations. It determined, although without a formal hearing, that the withdrawal of its consent would not be in the public interest. And it is difficult to understand how it is contrary to the public interest merely to forbid the petitioners to advertise the performance of a product unfairly and deceptively by presenting evidence that is not "competent" or "reliable" to prove the claims made, or to make any statements or representations about performance without a reasonable basis for these statements.

I find it similarly hard to understand why it would be unconscionable to hold petitioners to the terms of their agreement even if some of their competitors are not forbidden by an express order to engage in the unfair and deceptive practices dealt with in the Ford - J. Walter Thompson orders. I find no allegations of fact which justify requiring the FTC to hold a hearing on an unconscionability issue. I would affirm.

APPENDIX B

(CAPTION OMITTED IN PRINTING)

(FILED JUNE 21, 1976)

Order

Before: EDWARDS, CELEBREZZE and MCCREE, *Circuit Judges.*

On petition to review Orders of the Federal Trade Commission,

These causes came on to be heard on the briefs and record of proceedings before the Federal Trade Commission and were argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the cases are remanded to the Federal Trade Commission for further proceedings.

It is further ordered that Petitioners recover from Respondent the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT.
/s/ JOHN P. HEHMAN
Clerk

APPENDIX C

(Caption Omitted in Printing)

(Filed December 10, 1976)

Order

Before: Edwards, Celebrezze and McCree, *Circuit Judges.*

On receipt of a motion for reconsideration of an opinion and an order of this court entered in the above-styled case, filed by respondent Federal Trade Commission (FTC); and

Noting in said motion that respondent FTC for the first time in this litigation called the attention of this court to an FTC order against the General Motors Corporation, styled "In the Matter of the General Motors Corporation, Docket No. C-2564"; and

Noting from the text of said order attached to said motion for reconsideration that the FTC in that case had, indeed, addressed to General Motors a broad order of a cease and desist character quite comparable to the broad orders complained about by petitioners Ford and Thompson in the instant litigation; and

Noting further that said General Motors order was actually entered before the orders complained about by Ford and Thompson in this case and was and is subject to judicial notice by this court; and

Further noting that said order completely negates petitioner Ford's claim that FTC had unfairly discriminated against Ford to its important competitive disadvantage, *vis-a-vis* General Motors, and that said order also serves to cast doubt upon Thompson's similar claim and thus appears to us to eliminate any need for a remand for hearing on said claims; and

Further noting that when this court sought a response from the parties of this litigation as to why the said FTC General Motors Order C-2564 had not been cited to this court, the responses filed serve to persuade us that however negligent such failure was, the failure was not deliberate or contemptuous,

Now, therefore, the motion for reconsideration is granted. The paragraph of the court's previous opinion starting at line 27 of page 4 of the slip opinion is hereby stricken and the following sentence is substituted: "We answer this question in the negative." Further, that portion of the slip opinion and dissent which follows line 25 of page 12 is excised and the following is substituted therefor:

> The majority of this court (Judge McCree dissenting) initially saw these facts as stating a claim of discriminatory treatment which warranted remand to the Commission for hearing. A slip opinion issued with such a disposition on this question.
>
> On motion for rehearing the FTC, for the first time, cited to this court another order which it had entered against General Motors Corporation. This order, entitled "In the Matter of the General Motors Corporation, Docket No. C-2564," was entered on October 7, 1974, the day before the orders against petitioners Ford and Thompson which are the subject of these petitions. The terms of this General Motors order follow:

It Is Ordered that respondent General Motors Corporation and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of automobiles, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automo-

biles is superior with regard to fuel economy to any other automobiles, whether manufactured by respondent or others, unless:

(a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

(b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order "sample" shall mean an actual automobile tested. It is provided, however, that nothing contained in this paragraph is intended to conflict with any guidelines, rules or regulations with respect to fuel economy testing or advertising that may hereafter from time to time be promulgated by any agency of the United States Government, and, if such conflict does occur, the guidelines, rules or regulations shall govern.

2. Misrepresenting in any manner the fuel economy of any automobiles or the superiority of any automobile over competing products in terms of fuel economy.

3. Representing, directly or by implication, by reference to a test or tests, that the performance of any automobile has been tested either alone or in comparison with other automobiles unless such representation(s) accurately reflect the test results and unless the tests themselves are so devised and conducted as to substantiate each such representation concerning the featured tests.

4. Misrepresenting in any manner the purpose, contents or conclusion of any test, report or study relating to the performance of its automobile.

For purposes of paragraphs 3 and 4 of this order, "test" shall include demonstrations which are claimed to be proof of the representations made.

5. Disparaging the quality or properties of any competing product or products through the use of false or misleading comparisons relative to fuel economy.

6. Placing in the hands of dealers for any of the products of the company an advertisement which contains any of the representations prohibited by paragraphs 1-5 above.

It Is Further Ordered that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It Is Further Ordered that respondent notify the Commission at least Thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It Is Further Ordered that the respondent herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

This order was applicable to all General Motors cars. It contained a similar broad prohibition concerning performance claims to that about which the Ford petition to this court complained. Beyond doubt, if the Commission had furnished a citation to this order in its brief or argument to this court, no remand order would have ever been issued. We note and accept the Commission's apologies for omission of an essential portion of the available records of the Commission as to the competitive disadvantage claim.

As to the second principal issue in this case (*i.e.* Ford's and Thompson's competitive disadvantage claims), we find no abuse of the Commission's discretion and the orders complained of in these petitions are affirmed.

ENTERED BY ORDER OF THE COURT.
/s/ JOHN P. HEHMAN
Clerk

APPENDIX D

Amended Opinion

(CAPTION OMITTED IN PRINTING)

Consolidated Petitions to Review Orders of the Federal Trade Commission

(DECIDED AND FILED JUNE 21, 1976,
AS AMENDED DECEMBER 10, 1976)

Before: EDWARDS, CELEBREZZE and MCCREE, *Circuit Judges.*

EDWARDS, *Circuit Judge.* These are consolidated petitions filed by the Ford Motor Company and J. Walter Thompson Co., its advertising agency, to review and set aside certain "consent" cease and desist orders entered by the Federal Trade Commission against both concerns. The underlying actions were brought by complaints issued under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1970), involving alleged unfair advertising of Ford Division products. One ad concerned the assertion that Ford Division cars were quieter than a glider in flight (which FTC contends isn't quiet at all). The other ad showed the alleged structural strength of Ford cars to resist lateral impact by having a hoist pick one up by the side rails. (The ability of the side guard rails to sustain the weight of the car does not, in FTC's view, prove much about their resistance to lateral impact.)

Both companies and FTC negotiated a proposed consent order under the FTC Rules then applicable. 16 C.F.R. 2.31-2.35 (1974).[1] The companies filed the consent orders properly executed by them, and the FTC provisionally accepted the proposed order. The rules also provided for the publication of the consent order for a period of sixty days in which FTC would accept comments, after which time the FTC would make a decision on whether or not finally to accept the consent order.

Ford and J. Walter Thompson assert that they were told during the negotiations by FTC representatives that FTC would not accept consent orders limited narrowly to the claims actually made in the pending complaints. Thereupon the order was drafted and consented to by the companies, applicable to all performance claims for the indefinite future. It is the breadth of the language employed in this regard which triggered this controversy.

Ford and J. Walter Thompson assert that during the sixty-day publication period, they learned that FTC had agreed with General Motors and its advertising agencies to a consent order limiting certain practices complained of in relation to that corporation to the specific practices involved. Ford then wrote the FTC indicating that the reported terms of the General Motors agreement would place Ford at a competitive disadvantage, that the consent order was no longer acceptable to Ford, and asking FTC to recall its provisional acceptance. FTC did not respond substantively to these communications, and on August 13 and 14, 1974, J. Walter Thompson and Ford filed letters of withdrawal of their consent. Thereafter, on October 21, the Secretary of the FTC wrote Ford and J. Walter Thompson that FTC rules don't authorize unilateral withdrawal by a respondent and that FTC would not withdraw its pro-

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[1] The rules have since been revised. *See* 40 Fed. Reg. 15235-36 (1975). The revision would not, however, necessarily avoid reoccurrence of the sort of dispute involved in this case.

visional acceptance. On November 19, 1974, FTC issued a final order to this effect. Both Ford and Thompson filed motions for reconsideration with FTC which motions were denied, resulting in this litigation.

We believe that this court has jurisdiction to hear a dispute between these parties concerning the validity of a "consent" agreement which dispute concededly arose by dint of an attempt to withdraw consent before the agreement became final. *See Swift & Co.* v. *United States,* 276 U.S. 311, 324 (1928); *Martin Marietta Corp.* v. *Federal Trade Commission,* 376 F.2d 430, 434 (7th Cir.), *cert. denied,* 389 U.S. 923 (1967).

Two other of the issues presented by the parties in this case may be disposed of quickly.

First, petitioners Ford and Thompson argue that respondent Federal Trade Commission was required, but failed, to support its consent orders entered in this case by findings of fact and conclusions of law. As we understand both the general nature of a consent order and the specific terms of the FTC rule applicable at the relevant times in this case, 16 C.F.R. § 2.31-2.35 (1974), the principal purpose of a consent order is to avoid the fact finding and adjudicatory process which petitioners now seek. Assuming that the consent orders herein were otherwise final and valid, we find no merit to this argument.

Second, respondent FTC claims that petitioners' current case should be dismissed because in the proposed consent orders they waived their rights to judicial review. The short answer to this argument is that generally the tail goes with the hide. Petitioners claim that their consent orders were legally withdrawn before they became final and binding. They also claim, in the alternative, that it was an abuse of discretion on the part of the Commission to fail to allow them to withdraw their consent. In either instance, the waivers of judicial review would be withdrawn with the consent orders.

We would phrase and answer the principal issues in this case as follows:

1) Was the Commission's interpretation of its consent order rules consistent with their language and with due process to the extent that they prevented petitioners' attempted unilateral withdrawal of consent?

We answer this question affirmatively.

2) Assuming the affirmative answer above, the remaining issue is: Even if petitioners weer not themselves privileged to withdraw their proffered consent orders, did the Commission abuse its discretion by refusing to withdraw its own provisional consent when petitioners sought such action on the grounds that subsequent developments concerning a major competitor showed that petitioners were being placed at an unfair competitive disadvantage by the consent orders?

We answer this question in the negative.

THE CONSENT ORDER RULE

Petitioners contend that:

> [T]he Commission's Rules placed no limitation on a respondent's right to withdraw consent before final action by the Commission and the Commission had never previously announced any interpretation of its Rules to preclude such withdrawal.

Respondent FTC in turn contends that the Commission's interpretation of its own rules is entitled to great deference and it interprets Rule 2.31-2.35 as not permitting unilateral withdrawal by petitioners. In this regard it analogizes the tender of the consent order to a stipulation of fact tendered to a court of law. It also emphasizes that Rule 2.34(b) by its terms allows the Commission to withdraw its "provisional consent," but does not provide any such right to petitioners. It therefore argues that the Latin maxim *ex-*

pressio unius est exclusio alterius (The mention of one implies the exclusion of others) applies to this case.

We consider the stipulation analogy and the cases illustrating it to be inapposite. The admission of facts and the consent to an order are neither identical nor even closely comparable. But certain provisions of the rules themselves are persuasive that Ford was intended to be bound.[2] These provisions call for 1) provisional acceptance by the Commission, 2) publication of the consent agreement with an invitation for public comment thereon for a period of sixty days, and 3) a one month period after receipt of public comment for the Commission to withdraw consent or to make its provisional acceptance final. As we see these separate provisions, they provide a final review of the proposed order after public scrutiny, with the Commission having the final right in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered. The Commission thus has reason to withhold its final approval and it likewise has reason not to extend that

[2] (b) Upon receiving such an agreement, the Commission may: (1) accept it; (2) reject it and issue its complaint and set the matter down for adjudication in regular course; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require), and decision in disposition of the proceeding. 16 C.F.R. § 2.34(b) (1974).

same right to withdraw to the party proposing the consent. The time limitations are reasonable ones. The party proposing the consent order is not left unilaterally committed for an indefinite period.

We conclude that the Commission's interpretation of its rules as prohibiting Ford and Thompson from unilateral withdrawal of their proposed consent orders is consistent with the language of the rule, does not offend due process, and should be accepted by this court. In this regard we recognize the deference due the Commission's interpretation of its own rules as frequently declared by the United States Supreme Court. *Udall* v. *Tallman*, 380 U.S. 1 (1965); *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The Competitive Disadvantage Issue

As to petitioners' claim of abuse of discretion, the position of the parties is fully stated by the following excerpts from the first of several Ford letters concerning this issue and from the single responsive letter from the Commission:

Ford's (and presumably Thompson's) Position

> The Commission's Inconsistent Treatment of Ford and General Motors
>
> While the Commission was investigating and negotiating with Ford concerning its "Lift" and "Glider" commercial, it was also investigating and subsequently litigating with General Motors the legality of Vega and Opel commercials in Docket No. 8907. Although the charges against General Motors were, in our view, more serious than those against Ford,* Ford believed

* The Commission in the Ford Complaint charged that certain advertising demonstrations did not prove the qualities of "strength" and "quietness" allegedly represented in the advertisements, but the Commission at no time challenged the truthfulness of the basic product claims themselves; the Commission in the General Motors Complaint, in contrast, challenged as untruthful the basic product claims made in the ads.

that because of the strenuous competition between these two leading manufacturers, the Commission would consider the two matters in parity and apply equivalent and non-discriminatory regulatory standards to both. This, historically, has been the Commission's pattern. Thus, in entering into consent negotiations in an effort to avoid prolonged and wasteful litigation, Ford justifiably expected that the ultimate disposition of the *General Motors* case would not place Ford at an unfair competitive disadvantage.

In entering into consent negotiations, Ford was advised by the Commission staff that, while the advertising challenged dealt only with claims of "quietness" and "structural strength," any Order to be acceptable to the Commission must, as a matter of policy, cover "performance" claims as well. Recognizing that cease and desist orders have traditionally been broader in scope than the particular practice challenged, Ford was willing to consider such an Order. At no time did it occur to Ford, or indeed appear plausible, that the Commission would consider applying a different standard in the *General Motors* case, in contravention of such policy.

It has now come to Ford's attention, through trade reports, that General Motors may have entered into a consent agreement with the staff in settlement of its case which contains an order limited to the claims challenged in its complaint (comparative "handling" claims) and fails to include the broad coverage of "performance" claims contained in the provisional Ford Order. This would be a far less stringent standard than applied in the *Ford* case and, if allowed to stand, would place Ford at such a competitive disadvantage as to make the Ford Order unacceptable.

We do not know with certainty that such an agreement has been reached in the *General Motors* case.

None is contained in the public record, but the Commission's public record does show an order of the Administrative Law Judge, dated May 3, 1974, containing a recitation that, on May 2, 1974, "it was indicated that a proposed consent settlement had been reached between complaint counsel and respondent General Motors . . .." Reports in the industry appear to confirm that an agreement has been reached.

So fundamental a difference in the compliance obligations which Ford and General Motors would carry under these Orders—particularly since the greater burden on Ford bears no relationship to the severity of the charges involved—would constitute an intolerable intrusion by the Commission into competition between the two companies. While this difference may result from the fact that the agreements were apparently negotiated by separate components of the Bureau of Consumer Protection, it cannot be justified on that basis. The Commission's obligation to protect the public interest carries with it a concomitant responsibility to regulate similarly situated competitiors in the same industry in a fair, equal and even-handed manner.

Ford has already suffered damaging publicity as a result of the unfortunate circumstances described above. To avoid further damage and to remain competitive, we must now ask that the Commission take action to assure that equivalent "fencing-in" of the two companies will result from entering these Orders. We, therefore, request, in light of the substantially narrower Order reportedly agreed upon in General Motors, that the Commission now recall the provisional Ford Order and similarly reduce its coverage to the claims actually challenged in the Ford Complaint, i.e., structural strength and quietness, eliminating the reference to broad general "performance" claims which now seems wholly inappropriate.

We urgently request the Commission's prompt consideration of this matter. Since the 60-day period during which the provisional Ford Order remains on the public record will expire on August 15, we ask for a reply sufficiently in advance of that date so Ford may determine what further action, if any, may be necessary in order to protect the Company's interests.

The Commission's Reply

This is in response to your letters of July 12, August 8, and August 14, 1974, which the Secretary acknowledged by letter of August 19, 1974.

With respect to the purported withdrawal by Ford Motor Company from the Agreement Containing Consent Order to Cease and Desist, dated December 14, 1973, in File No. 722 3122, you are advised that the Commission's Rules of Practice do not authorize unilateral withdrawal by a respondent from an agreement accepted by the Commission pursuant to Subpart C thereof (Sections 2.31 through 2.35, inclusive). The Commission has, however, reviewed the facts and considerations set forth in your letters as argument in support of a request that the Commission withdraw its acceptance of the Agreement. The Commission finds that the public interest would not be served by such action.

The Commission's brief filed in this appeal adds little to the modicum of information provided above. It complains about the lack of specificity in the petitioners' allegations concerning the General Motors consent order (which petitioners, as of the July 12, 1974, date, could not have seen). It also argues:

> Besides, while the GM consent order is less restrictive than the Ford consent order in one respect, the GM order is substantially *broader* in coverage. The advertising ban in the Ford order applies only to *some* vehicles, while the GM order applies to *all vehicles.* (J.A. 17, Pet. Br. A-15). Understandably, Ford does not complain about *this* aspect of its consent order.

Basically, however, the Commission simply refused to comment on, talk about, or give evidence of any serious consideration to petitioners' claims of competitive disadvantage arising after petitioners had filed their consent orders because of the assertedly more favorable treatment of Ford's prime competitor, General Motors.

While we have previously upheld the Commission's contention that petitioners had no absolute right to withdraw their consent orders, petitioners also timely sought the Commission's own withdrawal of its "provisional" consent. *See generally Sunshine Art Studios, Inc.,* FTC File No. 682 3221. This action was clearly within the Commission's powers as defined by its own rules. The Commission's refusal to withdraw its consent is reviewable by this court for abuse of its discretion under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971).

The General Motors order referred to by petitioners is now, of course, a matter of public record. The differences in treatment are real ones:

The Ford Order

> It Is Ordered that respondent, Ford Motor Company, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution, in commerce as "commerce" is defined in the Federal Trade Commission Act, of the Ford LTD automobile, the Ford Galaxie automobile

or any other motor vehicle marketed by the Ford Division, do forthwith cease and desist from:

(a) Unfairly or deceptively advertising any such product by presenting evidence, including tests, experiments, or demonstrations, or the results thereof, that appears or purports to be evidence of the structural strength, quietness or performance of such product, that is material to inducing the sale of such product, but which is not competent or reliable evidence to prove such fact or product feature.

(b) Making any statements or representations directly or by implication, concerning the structural strength, quietness or performance of the said products or any part thereof, unless there exists a reasonable basis for such statements or representations; provided that such a reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

The General Motors Order

I. It Is Ordered that respondent General Motors Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "Commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual,

group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

(a) respondent has a reasonable basis for such representation, which shall consist of a competent scientific test or tests that substantiate such representation; and

(b) respondent's agents, employees or representatives who are responsible for engineering approval of any advertisement containing such representation rely on such test or tests in approving such advertisement and provide to respondent's agents, employees or representatives who are responsible for approval of such advertisement a written statement that such test or tests exist which substantiate the representation.

Thus Ford, under the disputed consent order, would be subject to a direct Commission order to cease and desist from not just the structural strength and quietness claims (which triggered this complaint), but from *all performance claims* which may be deemed based on false or deceptive advertising.

General Motors, on the other hand, is under no such broad continuing restrictions. Its order is limited to the subject of the complaint against it, namely, superiority in handling.

The majority of this court (Judge McCree dissenting) initially saw these facts as stating a claim of discriminatory treatment which warranted remand to the Commission for hearing. A slip opinion issued with such a disposition on this question.

On motion for rehearing the FTC, for the first time, cited to this court another order which it had entered

against General Motors Corporation. This order, entitled "In the Matter of the General Motors Corporation, Docket No. C-2564," was entered on October 7, 1974, the day before the orders against petitioners Ford and Thompson which are the subject of these petitions. The terms of this General Motors order follow:

> IT IS ORDERED that respondent General Motors Corporation and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of automobiles, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:
>
> 1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles is superior with regard to fuel economy to any other automobiles, whether manufactured by respondent or others, unless:
>
> (a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or
>
> (b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.
>
> For the purpose of this order "sample" shall mean an actual automobile tested. It is provided, however, that nothing contained in this paragraph is intended to conflict with any guidelines, rules or regulations

> with respect to fuel economy testing or advertising that may hereafter from time to time be promulgated by any agency of the United States Government, and, if such conflict does occur, the guidelines, rules or regulations shall govern.
>
> 2. Misrepresenting in any manner the fuel economy of any automobiles or the superiority of any automobile over competing products in terms of fuel economy.
>
> 3. Representing, directly or by implication, by reference to a test or tests, that the performance of any automobile has been tested either alone or in comparison with other automobiles unless such representation(s) accurately reflect the test results and unless the tests themselves are so devised and conducted as to substantiate each such representation concerning the featured tests.
>
> 4. Misrepresenting in any manner the purpose, contents or conclusion of any test, report or study relating to the performance of its automobile.
>
> For the purposes of paragraphs 3 and 4 of this order, "test" shall include demonstrations which are claimed to be proof of the representations made.
>
> 4. Disparaging the quality or properties of any competing product or products through the use of false or misleading comparisons relative to fuel economy.
>
> 6. Placing in the hands of dealers for any of the products of the company an advertisement which contains any of the representations prohibited by paragraphs 1-5 above.
>
> IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHER ORDERED that respondent notify the Commission at least Thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations out of the order.

IT IS FURTHER ORDERED that the respondent herein shall within sixty (60) days after service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

This order was applicable to all General Motors cars. It contained a similar broad prohibition concerning performance claims to that about which the Ford petition to this court complained. Beyond doubt, if the Commission had furnished a citation to this order in its brief or argument to this court, no remand order would have ever been issued. We note and accept the Commission's apologies for omission of an essential portion of the available records of the Commission as to the competitive disadvantage claim.

As to the second principal issue in this case (*i.e.* Ford's and Thompson's competitive disadvantage claims), we find no abuse of the Commission's discretion and the orders complained of in these petitions are affirmed.

Entered by order of the Court
/s/ JOHN P. HEHMAN
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 76-1424

JOHNSON PRODUCTS COMPANY, *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Trade Commission

(ARGUED JANUARY 6, 1977—DECIDED FEBRUARY 16, 1977)

Before PELL and SPRECHER, *Circuit Judges,* and EAST, *Senior District Judge.**

SPRECHER, *Circuit Judge.* Johnson Products Company [hereinafter referred to as "Johnson"] petitions this court to review and set aside a "consent" cease and desist order entered against it by the Federal Trade Commission [hereinafter referred to as the "FTC" or the "Commission"] on February 10, 1976, FTC Docket No. C-2788.

I

On June 9, 1975, Johnson executed an agreement containing a consent cease and desist order, which was negotiated under the FTC consent order procedures. 16 C.F.R. §§ 2.31-2.35. The order prohibited Johnson from making certain representations regarding its cosmetic products and required Johnson to make warnings in connection with its hair relaxer products.

On November 19, 1975, the Commission accepted the executed agreement, and it was placed on the public record for sixty days in order to permit interested persons to file comments with the Commission regarding the pro-

* Senior District Judge William G. East of the District of Oregon is sitting by designation.

posed *Johnson* order. After the public comment period, the Commission was to have thirty days in which to consider the comments and make a final decision on whether to withdraw its prior acceptance of the agreement or to enter the order contained in the agreement. This process is required by the Commission's rules and the parties' agreement. *See* 16 C.F.R. § 2.34; Agreement Containing Consent Order to Cease and Desist, Paragraph D.[1]

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[1] 16 C.F.R. § 2.34 states:

> Upon receiving an executed agreement conforming with the requirements of § 2.32, the Commission may: (1) Accept it; (2) reject it and issue its complaint; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission will place the order contained therein and any initial report of compliance submitted pursuant to § 2.33 on the public record, and at the same time, will make available an explanation of the provisions of the order and the relief to be obtained thereby and any other information which it deems helpful in assisting interested persons to understand the terms of the order. The Commission will publish the agreement, order and explanation in the Federal Register. For a period of sixty (60) days after placement of the order on the public record and issuance of the statement, the Commission will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require), and decision, in disposition of the proceeding.

Paragraph D of the agreement provides:

> This agreement shall not become a part of the official record of the proceedings unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if, within thirty (30) days after the sixty (60) days period, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

In a letter dated January 19, 1976—the last day of the public comment period, but prior to any final decision by the Commission—Johnson notified the Commission that it was withdrawing its consent to the agreement because of the "unexpected delay in reaching similar agreements with the balance of the industry, and . . . the documentable threat of unfair competition resulting therefrom."

In a letter dated February 11, 1976, the Commission advised Johnson that it refused to allow the withdrawal of consent and that it had entered the cease and desist order on February 10, 1976. On March 22, 1976, Johnson filed a Petition for Reconsideration, which was denied on May 7, 1976.

The matter is now properly before us on a petition filed by Johnson to review and set aside the order entered by the Commission. 15 U.S.C. § 45(c); *Federal Trade Commission* v. *Consolidated Foods Corp.*, 396 F. Supp. 1344, 1349-50 (S.D.N.Y. 1974).

II

The first issue raised by Johnson is whether it had the right to *unilaterally* withdraw its consent to the agreement containing the cease and desist order.

Johnson's argument may be briefly summarized. The FTC consent order procedures are subject to common law contract principles. FTC Rule 2.34, 16 C.F.R. § 2.34, gives the Commission thirty days after the public comment period in which to make a final decision on whether to withdraw its acceptance of the agreement or to enter the consent order. Since the Commission can withdraw its acceptance, two contract principles permit consent order respondents to withdraw their consent so long as the withdrawal occurs prior to a final decision by the Commission: (1) since the Commission never made an *unconditional* acceptance, respondents may withdraw their offers

of consent; and (2) since there exists no *mutuality of obligation* before a final Commission decision, there is no enforceable contract. And, since Johnson in fact withdrew its consent prior to the Commission's decision to enter the order, the issuance of the order over Johnson's objections was error and violative of due process.

We begin our inquiry by examining the premise upon which Johnson's entire argument is constructed—namely, that the law of contract governs the question of whether a consent order respondent may unilaterally withdraw its consent prior to a final determination by the Commission to enter the agreed upon order. In *United States* v. *Armour & Co.*, 402 U.S. 673 (1971) and *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 (1975), the Supreme Court indicated that in determining the scope of a consent decree—what is prohibited or required by the terms of the decree—rules of contract construction should be employed. However, in *ITT Continental Baking Co.*, the Court specifically noted that

> [c]onsent decrees and orders have attributes both of contracts and of judicial decrees or, in this case, administrative orders. While they are arrived at by negotiation between the parties and often admit no violation of law, they are motivated by threatened or pending litigation and must be approved by the court or administrative agency. . . . Because of this dual character, consent decrees are treated as contracts for some purposes but not for others.

Id. at 236-37 n.10 (citations omitted).

Thus, whether a consent decree will be treated as a contract will depend upon the particular context in which the issue arises. In *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), for example, the Court summarily rejected the contention that a consent decree should be considered a contract for purposes of determining whether the courts have

the power to modify such a decree absent the parties' consent. And, in *Control Data Corp.* v. *International Business Machines Corp.*, 306 F. Supp. 839 (D. Minn. 1969), *aff'd*, 430 F.2d 1277 (8th Cir. 1970), the court rejected the argument that a consent decree should be treated as a contract for purposes of determining whether a third party beneficiary action could be maintained for breach of that contract.

As Professor Handler has pointed out, treating consent decrees differently in distinct contexts is not inconsistent:

> The only issues before the Court in *Armour* was the "narrow question" of the proper construction of the . . . Decree. *Armour* is in total harmony with the time-honored view that consent decrees are to be treated as contracts for purposes of construction. When Justice Cardozo characterized such a decree in *Swift* as a judicial act, it was with reference to an equally time-honored principle that an injunction is always subject to adaptation on a showing of changed circumstances. Hence, *Armour* and *Swift* merely reflect the fact that "it is possible for a court to treat a stipulated judgment as a contract for one purpose but not for another"—a recognition that avoids the pitfalls of "lump concept" thinking.[2]

With these principles in mind, we think that the FTC consent order process should not be treated as a mere codification of the contract law of offer and acceptance

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[2] Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 28 (1972). *See also* Sullivan, *Enforcement of Government Antitrust Decrees by Private Parties: Third Party Beneficiary Rights and Intervenor Status*, 123 U. PA L. REV. 822, 847 (1975) [hereinafter cited as *Sullivan*]. Although Professor Sullivan disagrees with the particular result reached in *Control Data Corp., supra*, he does not reject the view expressed in the text that consent decrees may be treated as contracts for some purposes and not for others.

for purposes of determining whether a respondent may unilaterally withdraw its consent prior to final agency action.[3] Moreover, "for reasons of . . . policy inapplicable to the usual contract,"[4] we find that respondents have no right to withdraw unilaterally from an FTC consent agreement.

The FTC rules authorize the Commission to accept an agreement containing a cease and desist order which has been executed by the respondent. 16 C.F.R. § 2.34. However, the rules expressly reserve to the Commission the right to withdraw its acceptance of the agreement after it has had an opportunity to consider the views filed by interested persons during the public comment period. 16 C.F.R. §§ 2.32, 2.34. The Commission is given thirty days in which to make its decision on whether to withdraw its acceptance. 16 C.F.R. § 2.34. The Commission interprets its rules, however, to preclude respondents who have executed consent agreements from unilateral withdrawal prior to the time designated for final agency action.

We are cognizant of the fact that a reasonable interpretation by the Commission of its own regulations is entitled to great deference by this court, *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), and we find persuasive several policy considerations supportive of the Commission's position.

The Commission, unlike a private litigant, must act in furtherance of the public interest. *Federal Trade Commission* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F.2d 1308, 1313-14 (D.C. Cir. 1968). When the Commission's consent, rather than adjudicatory, procedures

[3] In view of this conclusion, it is unnecessary to decide whether, if treated as an ordinary civil contract, the agreement containing the consent order was enforceable at the time of Johnson's purported withdrawal.

[4] *Sullivan, supra* note 2, at 847.

are followed, there is no public hearing on the record, the negotiations culminating in the consent agreement are generally not a matter of public record, and there is no opportunity for interested persons to intervene and participate in the process. *See generally* 16 C.F.R. §§ 2.31-2.35. Where the terms of an order have been arrived at in such secret negotiations and the basis for agreement on those terms is not subject to public scrutiny, it was not unreasonable for the Commission to conclude that the public interest could not be adequately protected by mere agreement of the parties.[5]

Hence, we cannot say it was unreasonable for the Commission, in order to safeguard against the risks inherent in the consent order process, to reserve to itself the right to withdraw its acceptance after the public comment period. The Commission's rules simply "provide a final review of the proposed order after public scrutiny, with the Commission having the final right in the public interest to escape from the consequences of the provisional consent if public comment provides objections which were not previously considered." *Ford Motor Co.* v. *Federal Trade Commission*, 1976-1 Trade Cas. ¶ 60,938 at 69,114 (6th Cir. 1976), *modified on other grounds, Ford Motor Co.* v. *Federal Trade Commission*, Nos. 75-1041, 75-1043 (6th Cir. Dec. 10, 1976).

Moreover, as did the Sixth Circuit in *Ford Motor Co.*, we find ample justification for the Commission's refusal to extend a similar right of unilateral withdrawal to respondents. The availability of the consent order process, as an alternative to adjudication, benefits both the Com-

[5] *See generally Note, The ITT Dividend: Reform of Department of Justice Consent Decree Procedures.*. 73 COLUM. L. REV. 594 (1973) [hereinafter cited as *Columbia Note*]. Most of the legal commentary in this area deals with the consent procedures of the Justice Department. However, the procedures of the FTC and Justice Department are similar in those aspects pertinent to the issues raised in this appeal.

mission and respondents in that it allows them to "save . . . time, expense, and inevitable risk of litigation." *Armour, supra*, at 681. The Commission "is able to stop a greater number of violations of the . . . [Federal Trade Commission Act] significantly more quickly, while being relieved of the uncertainties and resource absorption of litigation."[6] Thus, the consent procedures, by avoiding protracted litigation in a significant number of cases, enable the Commission to more efficiently allocate its limited resources in order to maximize the protection of the public from "unfair or deceptive acts or practices." Respondents are benefited in that "consent decrees offer minimal favorable publicity [especially in view of the fact that frequently there is no admission that the law has been violated], considerably lower expense, and lesser disruption of the defendant's ordinary business affairs."[7] The respondent may also be able, through the negotiation process, to obtain a decree or order more favorable than one which might have resulted if the respondent had insisted on adjudicating the charges brought by the Commission.

It certainly was not unreasonable for the Commission to conclude that permitting respondents to withdraw unilaterally from the consent agreement which they have executed and presented to the Commission for acceptance may pose a serious risk of undermining the continued efficacy of the consent order process as an alternative to lengthy adjudication. As the Commission noted in its brief to this court:

> [R]espondents might be encouraged to use the Commission's consent procedures as a dilatory tactic, for if a company were not bound at the outset of the 60-day comment period, it might be tempted to "agree" to an order, only to "withdraw" its agreement at the last moment in order to propose a new, slightly revised version. This tactic might be employed again after the Commission had accepted the revised version. In the meantime, the Commission, in reliance upon the respondent's action in signing the agreement, foregoes the opportunity of instituting formal proceedings.

Commission Brief at 13.

[6] *See Columbia Note*, note 5 *supra*, at 596 (footnote omitted).

[7] *Id.* at 596 (footnote omitted).

In other words, if unilateral withdrawal by respondents were permitted, it might "provide another delaying tactic for the recalcitrant offender whose design is to prolong as much as possible the period during which he can continue the use of his advertisement."[8] Moreover, even if the withdrawal were not motivated simply by the desire to delay enforcement of the Act's proscriptions but rather reflected a genuine change in the respondent's judgment as to the relative benefits ad costs of the consent and adjudicatory processes, the detrimental impact on the viability of the consent process may be no less serious. If the Commission faces the prospect of negotiation, agreement, withdrawal and then protracted adjudication—the very result the consent procedures were designed to avoid—it may decide that efficient allocation of agency resources dictates a policy of adjudication at the outset. The aforementioned benefits to the pcblic and many respondents from the availability of consent procedures may then be lost.

Finally, we note that the "time limitations are reasonable ones. The party proposing the consent order is not left unilaterally committed for an indefinite period." *Ford Motor Co., supra*, at 69,114.

Accordingly, we hold "that the Commission's interpretation of its rules as prohibiting . . . [Johnson] from *unilateral* withdrawal of . . . [it proposed consent order] is

[8] Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1073 (1967).

consistent with the language of the rule, does not offend due process, and should be accepted by this court." *Ford Motor Co., supra,* at 69,114 (emphasis added).[9]

Johnson next contends that, even if it had no right to withdraw *unilaterally* from the consent agreement, *under the total circumstances of this case* the Commission's refusal to allow withdrawal or to at least hold a hearing on the question constituted an abuse of discretion.

The alleged "circumstances" upon which Johnson relies may be briefly summarized. Johnson contends that it competes with Revlon, Inc. and its subsidiaries in the relevant hair relaxer markets. During the course of the consent order negotiations, Johnson advised the Commission that if similar restrictions were not imposed on other major competitors, especially Revlon, Johnson would suffer competitive disadvantage. Johnson further claims that when it executed the consent agreement, it did so in reliance on the assurances of FTC representatives that the entire industry, including Revlon, would be subject to equally restrictive orders.

However, when no action had been taken against Revlon by the last day of the public comment period on the *Johnson* order, Johnson claims that it was required to withdraw from the consent agreement because of the risk of unfair competitive disadvantage, Moreover, the consent order which the Commission finally entered against Revlon was less restrictive in its terms than the *Johnson* order. The disparities, Johnson contends, reflect an unfair and arbitrary discrimination between similarly situated competitors. The

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[9] Our holding is limited to the question of whether a respondent may unilaterally withdraw its consent from an FTC consent agreement. For the reasons stated in Part III of this opinion, we expressly reserve the question of whether *under certain circumstances* a Commission refusal to either withdraw its own acceptance or to allow a respondent to withdraw its consent would constitute an abuse of discretion or a violation of due process.

disparity on which Johnson placed principal reliance is in the area of product coverage; the *Johnson* order prohibits certain representations in connection with *any cosmetics,* while the proscriptions in the *Revlon* order are limited to *hair care products.*[10]

The Commission's explanation of the disparate treatment of Johnson and Revlon appears in a letter to Johnson's counsel dated January 3, 1977.[11] The Commission asserts that, in several respects, the two companies were not similarly situated: (1) there existed differences in "the nature of the practices which constituted the violation, the nature and extent of the harm caused by the practices, and the feasibility of complying with the reporting requirements of the order"; (2) hair straighteners accounted for a lower percentage of Revlon's sales than was the case with Johnson; and (3) Revlon does not compete with Johnson in the consumer market, in which hair straighteners may have their most injurious impact, Johnson, however, challenges each of the Commission's claims, except the assertion as to percentage sales which Johnson contends is irrelevant.

The Commission correctly asserts that, without simultaneously proceeding against all firms in an industry, the Commission has the discretionary power "to enter an order

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[10] Johnson also asserts a substantial competitive injury from the delay in entering an order against Revlon, since Johnson was required to comply with advertising restrictions while a major competitor, Revlon, was able to do business free of such restrictions.

[11] The Commission's response to Johnson's claim of competitive injury from the delay in entering the *Revlon* order (*see* note 10, *supra*) is that "the alleged competitive harm . . . will not be removed by rejecting the *Revlon* consent order and issuing a complaint. Litigation of the complaint will be prolonged, and there is no assurance that the relief ultimately imposed will be identical with that required in the *Johnson* order."

against one firm that is practicing an industry-wide illegal trade practice." *L.G. Balfour Co.* v. *Federal Trade Commission,* 442 F.2d 1, 24 (7th Cir. 1971) (citations omitted). *See also Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413-14 (1958); *United Biscuit Company of America* v. *Federal Trade Commission,* 350 F.2d 615 (7th Cir. 1965). It is also within the Commission's remedial power to fashion an all-products order, such as the *Johnson* order, even though the violations charged in the complaint relate to less than all the respondents' products. Id. at 623.

There are, however, limits on the Commission's discretionary enforcement authority.[12] As this court stated in *L.G. Balfour Co.:*

> [T]he Commission's orders are to serve a remedial and not a punitive function, . . . and the Commission may not issue orders which would arbitrarily destroy one of many violators in the market. . . . It is the responsibility of the Commission to perform a "reasonable evaluation" of the competitive situation to ascertain whether a particular order would be contrary to the purpose of the laws sought to be enforced.

Id. at 24 (citations omitted). *See also Federal Trade Commission* v. *Universal-Rundle Corp.,* 387 U.S. 244 (1967); *Moog Industries, supra.* Thus, the Commission's "discretionary determination . . . [may] be overturned . . . [for] a patent abuse of discretion." *Moog Industries, supra,* at 414.

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[12] In addition to the limits on an arbitrary regulatory policy articulated in the text, due process problems may arise under certain circumstances where a consent order is entered over the objections of one of the parties. *Cf. United States* v. *Ward Baking Co.,* 376 U.S. 327 (1964); *United States* v. *Armour & Co.,* 402 U.S. 673 (1971).

However, we find it impossible on the record before us[13] to determine whether it constituted a patent abuse of discretion for the Commission to refuse to permit Johnson to withdraw from the consent agreement in the face of Johnson's claim that the Commission's regulatory policy had arbitrarily placed Johnson at an unfair competitive disadvantage vis-à-vis other competitors in the industry. The only facts of record are: (1) that Johnson advised the Commission of Johnson's concern that competitive disadvantage would result if equally restrictive orders were not imposed on all major competitors, and (2) that the order subsequently entered against Revlon was in several respects —the most important being product coverage—less restrictive than the *Johnson* order.

There is no support in the record for Johnson's claims that FTC representatives made assurances that equally restrictive orders (*e.g.* all-products orders) would be imposed on all major competitors including Revlon, that the disparate treatment of Johnson and Revlon was arbitrary, and that the disparate treatment would result in serious competitive injury to Johnson. Similarly, there is no support in the record for the Commission's assertion that the disparities between the *Johnson* and *Revlon* orders are justified by the "fact" that, in several pertinent respects, the two companies are not similarly situated.

Accordingly, the inadequacy of the record at this stage of the proceedings precludes us from reaching the question of whether the *Johnson* order, under all the circumstances, should be set aside as an abuse of discretion.

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[13] When an order issues after adjudication, there is a hearing on the record and findings, and the reviewing court can determine whether the agency's regulatory policy evidences a patent abuse of discretion. Since both the *Johnson* and *Revlon* orders are consent orders, the terms were formulated in secret negotiations and there is no record evidence of the basis for the precise terms of the subsequently issued orders.

The remaining issue, therefore, is whether *Johnson* was entitled to a hearing with findings on its claim that, under the circumstances, it should have been allowed to withdraw from the consent order agreement. However, three days prior to the oral argument in this cause, the Commission "extended to Johnson an invitation to apply for reopening of its consent order. The Commission may determine during the course of such a proceeding that the public interest requires modification of the *Johnson* order to eliminate some or all of the disparities you describe."

If during the course of the reopening proceedings the *Johnson* order is in fact modified to eliminate the critical disparities between the *Johnson* and *Revlon* orders, the circumstances which Johnson contends permit it to withdraw from the consent agreement will likewise have been eliminated. Since we held in Part I of this opinion that Johnson had no *unilateral* right to withdraw from the consent order, there would remain no issues for this court to decide.

In these circumstances, we are of the opinion that, before deciding what may prove to be an important and difficult question of administrative law, the Commission should first be afforded the opportunity to reexamine the challenged disparities between the *Johnson* and *Revlon* orders.

Accordingly, we retain jurisdiction over the cause, stay enforcement of the order, and remand to the Commission for further proceedings consistent with this opinion.

REMANDED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX F

Subpart C—Consent Order Procedure

§ 2.31 NOTICE OF PROPOSED ADJUDICATIVE PROCEEDING.

Where time, the nature of the proceeding, and the public interest permit, the Commission may notify a person, partnership, or corporation of its intention to institute a formal proceeding against such party, charging him with having violated one or more of the statutes administered by the Commission. Such notice will be accompanied by a form of complaint which the Commission intends to issue, together with a proposed form of order.

§ 2.32 REPLY.

Within ten (10) days after service of such notice the party named in the proposed complaint may file with the Secretary of the Commission a reply stating whether or not he is interested in having the proceeding disposed of by the entry of a consent order. If the reply is in the negative or if no reply is filed within the time provided, the complaint will be issued and served forthwith. If the reply is in the affirmative, the party served will be afforded an opportunity to execute an appropriate agreement for consideration by the Commission. The party may appear personally or he may be represented by counsel who has entered an appearance under § 4.1 of this chapter.

§ 2.33 AGREEMENT.

Every agreement shall contain, in addition to an appropriate order, an admission of all jurisdictional facts and express waivers of further procedural steps of the requirement that the Commissions decision contain a statement of findings of fact and conclusions of law, and of all rights to seek judicial review or otherwise to challenge or contest the validity of the order. The agreement shall

also contain provisions that the complaint may be used in construing the terms of the order, and that no agreement, understanding, representation, or interpretation not contained in the order or the aforementioned agreement may be used to vary or to contradict the terms of the order; that the order shall have the same force and effect and shall become final and may be altered, modified, or set aside in the same manner and within the same time provided by the statute for other orders; that the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission; and that the Commission may withdraw its acceptance of the agreement if, within thirty (30) days after such acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate. In addition, the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission by any party that the law has been violated as alleged in the complaint. (18 U.S.C. 6002, 6004) [37 F.R. 5017, Mar. 9, 1972]

§ 2.34 Disposition.

(a) Within thirty (30) days after the filing of an affirmative reply under § 2.32, an executed agreement conforming with the requirements of § 2.33 may be submitted to the Commission through the operating Bureau in which the matter is then pending.

(b) Upon receiving such an agreement, the Commission may: (1) Accept it; (2) reject it and issue its complaint and set the matter down for adjudication in regular course; or (3) take such other action as it may deem appropriate. If an agreement is accepted, the Commission

will place the order contained therein on the public record for a period of thirty (30) days, during which it will receive and consider any comments or views concerning the order that may be filed by any interested persons. Thereafter, within thirty (30) days, the Commission may either withdraw its acceptance of the agreement and so notify the other party, in which event it will take such other action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require), and decision, in disposition of the proceeding.

(c) If an agreement is not so submitted, or if at any time it appears to the operating Bureau in which the matter is then pending that the execution of a satisfactory agreement is unlikely, such Bureau, after notification to the proposed respondents of its intention to do so, shall submit the matter to the Commission, together with any written offers of settlement which the proposed respondents desire to have the Commission consider. The Commission will thereupon take such action as may be appropriate.

(d) After a complaint has been issued, the consent order procedure described in this part will not be available. However, in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order. In such event, the Commission will treat the matter as being in a nonadjudicative status and may consult with and receive advice from its staff members and others. This rule will not preclude the settlement of the case by regular adjudicatory process through the filing of an admission answer or submission of the case to the administrative law judge on a stipulation of facts and an agreed order. [34 F.R. 12992, Aug. 12, 1967, as amended at 37 F.R. 23826, Nov. 9, 1972]

§ 2.35 Notice of Proposed Adjudicative Proceeding Included in Public Records.

Notice and proposed forms of complaints and orders under § 2.31 are included in the public records of the Commission and will be the subject of releases through the Commission's Office of Public Information. Ordinarily, there will be no additional release if and when a complaint is issued under the Commission's adjudicative procedures. All negotiations and communications under §§ 2.32, 2.33, and 2.34 will constitute a part of the confidential records of the Commission, except to the extent otherwise specifically provided therein. [35 F.R. 10584, June 30, 1970]